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No. 00-1927

Supreme Court, U.S.
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In The

Supreme Court of the United States

JESSE ODEN,

Petitioner,

v.

OKTIBBEHA COUNTY, MISSISSIPPI;
DOLPH BRYAN, individually and in his
official capacity as Sheriff of Oktibbeha County,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

This brief is submitted to reply to two contentions in the opposition brief of the respondent: (1) that *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) precludes a lawsuit against state actors under 42 U.S.C. § 1981; and (2) that any claim here must allege and prove a custom or policy. These are addressed in turn.

Contrary to the repeated suggestions of the respondents, op. cert. at 3-8, 10, and of several courts of appeals, *see*, pet. app. 4-5 and n.2, *Jett* never explicitly held that § 1981 provides a citizen with no rights against state actors. It simply held that a cause of action invoking such rights does not provide remedies any broader than those provided under 42 U.S.C. §

1983. Indeed, in a number of places, the plurality in *Jett* made it clear that § 1981 can be infringed by state action. *See, e.g.*, 491 U.S. at 731 (referring to "the 'state action' portion of § 1981"); *id.* at 735-736 (stating that, under certain circumstances, a person's "'right to make contracts' protected by § 1981" can be vindicated by lawsuits against local governments).

In the present case, as noted by the Court of Appeals, pet. app. at 2, the plaintiff raised claims under Title VII of the Civil Rights Act of 1964 and also under § 1981. He did not specifically mention § 1983 in his complaint. But if § 1981 protects certain rights against state action, surely it is not necessary to mention § 1983 in the complaint. § 1983 simply provides that "any person who, under color of any law . . . shall subject . . . any person . . . to the deprivation of any rights . . . *secured by the Constitution or laws of the United States*, shall . . . be liable to the party injured in any action at law. . . ." (Emphasis added). In other words, "rights . . . secured by the . . . laws of the United States" can be invoked "in any action at law" against a state actor. § 1981 is one of the "laws" that is the source of those "rights" — in this case, what the plurality in *Jett* called the "'right to make contracts' protected by § 1981." § 1983 is a procedural vehicle simply allowing the "rights . . . secured by" those laws to be enforced in courts. While it likely is necessary in a complaint to invoke the specific law that provides the source of the rights at issue — in this case § 1981 — it is not necessary to specifically mention § 1983, which provides no substantive rights, but simply sets out a procedural vehicle.

As mentioned in our petition for certiorari, all of this is supported by the language of 42 U.S.C. § 1981(c), added in 1991, which confirms that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination *and impairment under state law*." (Emphasis added). Even if this does not overrule the holding in *Jett* that

remedies under § 1981 are no broader than those under § 1983, it does confirm that lawsuits against state actors can be brought under § 1981. (Indeed, as mentioned previously, *Jett* never explicitly held otherwise). If that is the case, then (as we explain at pp. 5-6 of our petition for certiorari) punitive damages are available against state actors in their individual capacities under § 1981.

Unfortunately, as noted previously, the Court of Appeals in this case, as well as some (but not all) of the other courts of appeals to address the question, have held that no claim can be brought against state actors under § 1981. That decision by the court below is one of the pillars upon which it rested its ultimate ruling that punitive damages are unavailable to a public employee claiming racial discrimination under § 1981 (even in individual capacity lawsuits). Because of the confusion and conflict that exists, this Court should grant certiorari.

Much of the respondent's brief in opposition is devoted to the contention that the plaintiff here has alleged no "custom or policy." Op. cert. at 7, 9-14. But a "custom or policy" is only one method for proving liability against a local government (or against a government officer in his or her official capacity, which is the same as proving liability against the government itself). Another method is to show that the official is a final policymaker for the governmental entity "such that [his or her] decisions may rightly be said to represent the official policy of the [local government]." *Jett*, 491 U.S. at 736. Here, of course, the Sheriff is the final policymaker in terms of hiring and firing deputy sheriffs.

More importantly, the basic question raised by the petition for certiorari in this case is whether the Sheriff here is liable for punitive damages *in his individual capacity*. *See*, pp. 5-6 of the petition. That, of course, requires no proof of a "custom or policy" or of action by a final policymaker. Those concepts

relate only to the liability of an officer in his or her official capacity, or to the liability of the local government that he or she represents.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

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